the learned judge, cannot fail to strike all minds alike with involuntary admiration. And in such a complication of buttresses and surrounding outworks, it could seem little less than a barbarous spirit of faultfinding and love of carping, for any one to interpose a serious protest against the principle of law involved in the decision. But after a good deal of study and a sincere and earnest effort to come to the same wise and just conclusion, looking only at the abstract equity and justice of the case, we cannot but fear that the rule of law here adopted is carrying this already overstrained department of legal refinement, somewhat beyond any case which has preceded it. We may recur to the subject hereafter. I. F. R.

Supreme Court of Pennsylvania, at Nisi Prius.

ANSPACH *vs.* THOMPSON ET AL.

A party applying for an order to examine a party to the record in a bill in equity, must make it appear that the proposed witness is without interest at the time the order is asked.

Whether such order is grantable of course on a suggestion of no interest, or only on previous notice to the opposite party, not decided.

But in either case it must be made with a saving of all just exceptions to the testimony when presented at the hearing.

Motion for an order to examine defendants on record, as witnesses for a co-defendant.

Porter and *Parsons*, for plaintiffs.

Cuyler, for defendants.

The opinion of the court was delivered by

THOMPSON, J.—This is a petition by one of the defendants, J. Edgar Thompson, on the bill in equity filed by John Anspach Jr., against him, Alex. Whilldin, Wm. J. Howard, and the American Life Insurance Company, for an order to examine before the master, two of his co-defendants, Alex. Whilldin and Wm. J. Howard. He sets forth that the said defendants and himself have severed in their defences, as their answers will show, and that the proposed witnesses have no real interest in the cause or the matters in question therein; and that their testimony is material to his defence, but that he is prevented from taking it before the master, because they are parties of record in the cause.

Undoubtedly an order under such circumstances is necessary in order to obtain the testimony, let the question of actual inte-

rest be as it may. That is to say, when the proposed witnesses are parties co-defendant, they are not examinable as of course like other witnesses. Their being on the record prevents this.

Some considerable diversity of opinion at bar seems to exist in regard to whether the application for the order to examine must be on previous notice to the opposite party, or whether it is of course. Daniell's Chancery Practice, vol. 2, p. 459 (Law Library Ed.) lays down the doctrine thus: "An order for leave to examine a party to the record may be obtained either upon motion in court or by petition at the rolls. In either case a previous notice is unnecessary, as the order will be granted as a matter of course, 'saving just exceptions,' upon the suggestion that the party to be examined has no interest in the cause or in the matters in question in the cause;" citing *Murray* vs. *Shadwell*, 2 V. & Beames 401. Other authorities cited are to the same effect: Smith's Chancery 147; *Van* vs. *Corpe*, 3 Mylne & Keen 269; *Lord Dungannon* vs. *Skinner*, 1 Hog. 272; *Paris* vs. *Hughes*, 1 Keen 1; 3 Greenl. Ev. § 318. In New York the practice seems to have been to proceed by petition: *Kirk* vs. *Hodgson et al.*, 2 John. Ch. 550; *Whipple et ux.* vs. *Lansing et al.*, 3 Id. 612.

Whether the order is of course or not, need not be discussed, for it is asked on petition here and previous notice, which has resulted in full argument. Certainly, however, the order is only grantable where the party proposed to be examined appears to be without interest at the moment he is called to testify; if before decree, that he is not subject to one for want of equity or on account of the proof. In *Anon.*, 18 Ves. Jr. 517, Lord ELDON refused such an application, observing that "the court in making the order for an examination of a party, saving just exceptions, proceeds upon the allegation that he has no interest; and if it perceives an interest will not make the order, even upon the supposition that the interest may be released before the examination; much less will it make the parties incur the expense of having the objection of interest taken at the hearing, upon which objection, if it had been taken upon a motion, the court would not have made such an order."

Mr. Daniell (*ubi supra*) seems to state the rule somewhat differently. He says: "although the court will, if it perceives that the suggestion of 'no interest' upon which the order is asked, is not true in fact, refuse to make the order, the general practice is to grant the order as a matter of course, leaving it to the other

party to make the objection that there are 'just exceptions,' at the time when the deposition is offered to be read." For this see *Lee* vs. *Atkinson*, 2 Cox 413. On this subject see also Adams's Equity 364, 2d Am. Ed., in notes, citing many English and American authorities.

I think the rule deducible from the cases is, that the proposed witnesses must appear to be without interest, whether the order is based on the allegation simply of "no interest," or upon cause shown, as in this case. In the investigation of this question, the interest not appearing in the bill, testimony or answer, I think, sufficient to exclude, cannot be tested by the counter-affidavit or answer to the petition or motion. That would be to exclude what might be disinterested testimony by the interested testimony of the party himself. At law, where the rule of interest which excludes witnesses is the same as in equity, we never hear of the party testifying to the interest of the witness so as to exclude him. Nor can I look to the affidavit in this case by the party asserting the interest of these witnesses. It must appear otherwise. Notwithstanding the necessity of appearing to be without interest, I think the rule general to make the order saving "*all just exceptions*" to the testimony when taken, so that the objection may still be made at the hearing. It is impossible, unless the court be in possession of the whole case, to make a peremptory order to hear the testimony of the parties. It is never done. *Primâ facie* then, in this case, no grounds appear for a decree against the witnesses named, nor that they are otherwise interested. It seems to me the bill presents no case of liability against them. Certainly, however this may be, their joint answer seems a full and complete denial of any present charge against them, and the complainants' testimony does not seem to touch, much less overturn the answers. I say this is as the case presents itself to me at this stage. I shall grant the order to examine Messrs. Whilldin and Howard "saving all just exceptions" to their testimony, which I understand may be taken to their competency, or for any other legal reason, at the hearing before the master. And I shall direct that the master return with his report the testimony thus taken, together with the entire testimony in the case.

Let an order be drawn in accordance herewith.